



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 14, 1998

Mr. John Steiner  
Division Chief  
City of Austin  
Law Department  
P.O. Box 1088  
Austin, Texas 78767-1088

OR98-3104

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 120158.

The City of Austin (the "city") received a request for "a copy of all responses" to a specified Request for Proposal. In response to the request, you submit to this office for review the records which you assert are responsive.<sup>1</sup> You state that "documentation which were not marked proprietary have been released to the requestor."<sup>2</sup> However, you assert that "portions of the documentation should be excepted from public disclosure based on the third party's privacy or property interests under sections 552.101 and 552.110 of the Texas Government Code." We have considered the exceptions you claim and reviewed the submitted information.

Pursuant to section 552.305, we notified Accelerated Technology Laboratories, Inc. ("ATL"), ChemWare, Inc. ("ChemWare"), and L.I.M.S. USA, Inc. ("LIMS"), whose proprietary interests may be implicated by this request for information, and provided them with an opportunity to claim that the information at issue is excepted from disclosure. See Gov't Code § 552.305; Open Records Decision No. 542 (1990). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information. However, only

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<sup>1</sup>You have submitted to this office information that apparently was sent for informational purposes only. In this ruling, we do not address that information.

<sup>2</sup>We note that information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

ATL and ChemWare responded to our notification. Since LIMS did not respond to our notification, we assume that their company has no property or privacy interest in the information. Therefore, we have no basis to conclude the information about LIMS is excepted from required public disclosure, and conclude it must be released. Consequently, we will only consider whether the requested information relating to ATL and ChemWare is excepted from disclosure under section 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>3</sup> Facts sufficient to show the applicability of these factors have not been provided by either ATL or ChemWare. See Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information). Therefore, the requested information concerning ATL and ChemWare is not excepted from disclosure under the trade secret prong of section 552.110.

We next consider whether the information at issue constitutes confidential "commercial or financial information." Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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<sup>3</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Consequently, if a governmental body or other entity can meet the test established in *National Parks*, the information may be withheld from disclosure.

"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). ATL's brief to this office asserts that the "ATL proposal was in response to a request for information that the city of Austin had solicited . . . [and] ATL would like to request that this information not be made available to our competitors as it contains proprietary information and trade secrets." ChemWare responded to our notification by arguing that most of the requested information, except for Attachment G, is excepted from disclosure under section 552.110 as "trade secrets or confidential and commercial information."<sup>4</sup> Neither ATL nor ChemWare has sufficiently established that releasing the requested information would likely cause them to suffer substantial competitive injury. Therefore, we conclude that the requested information is not excepted from disclosure pursuant to section 552.110.

We next address whether section 552.101 requires the city to withhold any of the submitted information. Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. However, we are not aware of any law that would render the information at issue confidential.<sup>5</sup> Therefore, because no party has shown that the requested information is excepted from disclosure, it must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A large, stylized handwritten signature in black ink, reading "Sam Haddad". The signature is written over the typed name "Sam Haddad".

Sam Haddad  
Assistant Attorney General  
Open Records Division

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<sup>4</sup>We also note that Attachments E, F, G and H either were blank pages with headings or were not submitted at all.

<sup>5</sup>Corporations do not have a protected common-law privacy interest. Open Records Decision Nos. 620 (1993), 192 (1978).

SH/rho

Ref.: ID# 120158

Enclosures: Submitted documents

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